Supreme Court, U.S.
FILED

10-472 OCT 1- 2010

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IN THE

Supreme Court of the United States

ARNOLDO J. ALEMÁN CARDENAL, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari

To The United States Court of Appeals,

Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of "invited error" is properly applied in a forfeiture case to deny claimants a fee award based on the full value of their illegally seized properly, when the incorrect value claimants placed on their property was not intentionally erroneous and was based upon information supplied by the United States.

LIST OF PARTIES IN THE COURT OF APPEALS

Appellants:

Maria Alejandra Alemán Cardenal

Arnoldo Jose Alemán Cardenal

Ana Eugenia Flores

Norma L. Flores

Jose Grullon

Maria Dolores Alemán Cardenal

Carlos Miguel Alemán Cardenal

Appellee:

United States of America

TABLE OF CONTENTS

Page

Question Presented i

List of Parties in the Court of Appeals ii

Table of Contents iii

Table of Cited Authorities iv

Opinion Below 1

Basis for Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 7

Reasons for Granting the Writ 8

Conclusion 18

Appendix A: Judgment and Opinion of the Court of Appeals 19

Appendix B: Opinion of the Court of Appeals in Prior Appeal 28

Appendix C: Order of the Court of Appeals On Petition for Rehearing and Petition for Rehearing En Banc 52

TABLE OF CITED AUTHORITIES

Cases — Page(s)

Continental Life & Acc. Co. v. Doig,
443 F.2d 27, 28 (9th Cir. 1971) 16

Eateries, Inc. v. J.R. Simplot Co.,
346 F.3d 1225 (10th Cir. 2003) 16

Fitch v. Public Utility Comm. of Tex.,
261 Fed. Appx. 788 (5th Cir. 2008) 15

Ford ex rel. Estate of Ford v. Garcia,
289 F.3d 1283, 1294 (11th Cir. 2002),
cert. denied, 537 U.S. 1147 (2003) 13

Growers Marketing Service, Inc. v. Conner,
249 So.2d 486, 487 (Fla. 2d DCA 1971) 17

Hudson v. United States,
522 U.S. 93 (1997) 11

In re Air Crash Disaster,
86 F.3d 498 (6th Cir. 1996) 15

McKesson HBOC, Inc. v. Islamic Republic of Iran,
271 F.3d 1101 (D.C. Cir. 2001) 17

People v. Cooper,
53 Cal.3d 771, 831, 281 Cal. Rptr. 90,
809 P.2d 865 (1991) 14

People v. Graham,
71 Cal.2d 303, 319, 78 Cal. Rptr. 217,
455 P.2d 153 (1969) 14

Statler v. Garcia,
No. C-01-00590-CRB, 2002 WL 31052588
(N.D. Cal. Sept. 11, 2002) 14

United States v. $125,938.62,
537 F.3d 1287 (11th Cir. 2008).....1

United States v. Cook,
336 Fed. Appx. 875 (11th Cir. 2009) 13

United States v. Ross,
131 F.3d 970, 988 (11th Cir. 1997) 13

United States v. Silvestri,
209 F.3d 1311, 1327 (11th Cir. 2005) 13

United States v. Stone,
139 F.3d 822, 838 (11th Cir. 1998) 13

Statutes

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1331.....8

28 U.S.C. § 1355.....8

28 U.S.C. § 2465.....2

28 U.S.C. § 2465(b)(2)(D) 7

Rules

S. Ct. R. 10(a) 9,12

S. Ct. R. 10(c) 12

OPINION BELOW

The decision of the United States Circuit Court of Appeals, Eleventh Circuit, of which review is sought in these proceedings, was rendered January 28, 2010, Eleventh Circuit Case No. 09-10402, and is unpublished. An earlier appeal in the same case resulted in a previous decision of the Eleventh Circuit, which is reported as *United States v. $125,938.62*, 537 F.3d 1287 (11th Cir. 2008).

BASIS FOR JURISDICTION

The Eleventh Circuit's Judgment in the appeal below was rendered January 28, 2010, and a motion seeking rehearing and rehearing en banc was denied on May 19, 2010. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

On August 19, 2010, Justice Thomas of this Court extended the time in which to file a petition for writ of certiorari, to and including October 1, 2010.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the attorney's fee provision of the Civil Asset Forfeiture Reform Act ("CAFRA"), 28 U.S.C. § 2465, which states:

> **(a)** Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law–
>
> > **(1)** such property shall be returned forthwith to the claimant or his agent; and
> >
> > **(2)** if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit

or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for–

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale–

(i) interest actually paid to

the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting

evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

(2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(C) If there are multiple claims to the same property, the United States

shall not be liable for costs and attorneys fees associated with any such claim if the United States–

> **(i)** promptly recognizes such claim;
>
> **(ii)** promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;
>
> **(iii)** does not cause the claimant to incur additional, reasonable costs or fees; and
>
> **(iv)** prevails in obtaining forfeiture with respect to one or more of the other claims.

(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of

> costs and attorney fees accordingly.

No Constitutional provisions are directly involved in the case.

STATEMENT OF THE CASE

The Petitioners below were claimants in a CAFRA case, seeking return of property seized by the United States. In the underlying civil forfeiture action, the Petitioners successfully recovered the proceeds from five of seven certificates of deposit (CDs) that had been seized by the Government.

Because the claimants were only partially successful, the trial court was required to "reduce the award of costs and fees accordingly," pursuant to 28 U.S.C. § 2465(b)(2)(D). One of the issues raised in the appeal below, and the only one raised in this Petition, involves the valuation of the CDs recovered by the claimants, which in turn impacts the amount of attorney's fees properly awarded, since claimants' counsel was hired on a contingency fee basis.

The Petitioners/claimants had initially mis-valued the CDs in question at $450,000.00, based on information provided to them by the United States, and the district court calculated the attorney fee award based on that value. Claimants subsequently discovered that the actual value of the CDs was $564,572.00, but the district court refused to revise its calculations and, accordingly, also refused to revise the attorney fee award which was based thereon.

On appeal, the Eleventh Circuit Court of Appeal upheld the district court's fee calculation based on the incorrect valuation of the CDs. The rationale of the Eleventh Circuit was that the initial valuation of $450,000.00 submitted by claimants was "invited error."

Jurisdiction in the district court below in the first instance was based on 28 U.S.C. § 1331 and 28 U.S.C. § 1355.

REASONS FOR GRANTING THE WRIT

THE DOCTRINE OF "INVITED ERROR" IS IMPROPERLY APPLIED IN A FORFEITURE CASE TO DENY CLAIMANTS A FEE AWARD BASED

ON THE FULL VALUE OF THEIR ILLEGALLY SEIZED PROPERTY, WHEN THE VALUE FIRST PLACED ON THE PROPERTY WAS NOT INTENTIONALLY ERRONEOUS, AND WAS BASED ON INFORMATION SUPPLIED BY THE UNITED STATES.

Compelling reasons exist to grant certiorari in the instant case. The Eleventh Circuit's misapplication of the "invited error" doctrine in the instant case, to an error that was not only unintentional but also based upon information supplied by the United States, is in conflict with the decisions of other United States courts of appeal on this same important matter, such that certiorari jurisdiction is proper under Rule 10(a) of the rules of this Court. Decisions of other federal courts have recognized that the "invited error" doctrine is inapplicable to situations involving mistake or inadvertence. Such a misapplication of the "invited error" doctrine is particularly egregious in a ***forfeiture*** case, where the claimed error is based on information supplied to claimants by the ***Government***. This Court and its various members have often noted that the United States has vast powers

in forfeiture cases, as well as a ***financial*** stake in the results of such cases, unlike other situations in which the government functions as prosecutor or enforcer of the law:

> We have noted elsewhere the expanding use of ostensibly civil forfeitures and penalties under the exigencies of the current drug problems, see *Ursery*, *supra*, at 300, 116 S.Ct., at 2153 (STEVENS, J., concurring in judgment in part and dissenting in part) ("In recent years, both Congress and the state legislatures have armed their law enforcement authorities with new powers to forfeit property that vastly exceed their traditional tools"); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-82, 114 S.Ct. 492, 515-516, 126 L.Ed.2d 490 (1993) (THOMAS, J., concurring in part and dissenting in part), a development doubtless spurred by the increasingly inviting prospect of its profit to the Government. See *id.*, at 56, n. 2, 114 S.Ct., at 502 n. 2 (opinion of the Court)

> (describing the Government's financial stake in drug forfeiture); see also *id.*, at 56, 114 S.Ct., at 502 (citing *Harmelin v. Michigan*, 501 U.S. 957, 978, n. 9, 111 S.Ct. 2680, 2693 n. 9, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.) for the proposition that "it makes sense to scrutinize governmental action more closely when the State stands to benefit").

Hudson v. United States, 522 U.S. 93, 114 (1997) (Souter, J., concurring).

Given that an award of claimants' attorney's fees under CAFRA operates as a ***check*** or limitation on the expansive powers of the Government in forfeiture cases, to allow the "invited error" doctrine to dilute or minimize such awards based on (mis)information ***provided by the Government*** would result in a serious and potentially dangerous expansion of Government power. Petitioners thus respectfully assert that, even if other circuit courts of appeal had ***not*** decided other "invited error" cases in a way conflicting with the Eleventh Circuit's decision below, this Court would ***still*** have certiorari jurisdiction

in the instant case, because of the ***forfeiture*** aspect of the case. Such certiorari jurisdiction is proper as an exercise by the Court of its "supervisory powers" pursuant to Supreme Court Rule 10(a) to correct a departure "from the accepted and usual course of judicial proceedings," or because the Eleventh Circuit's misuse of the "invited error" doctrine to water down a CAFRA attorney's fee award constitutes "an important question of federal law that has not been, but should be, settled by this Court," under Supreme Court Rule 10(c). Conversely, to ***not*** grant certiorari in this case could be construed as an invitation to the Government to engage in overzealous application of the federal forfeiture statutes, since the Government's exposure to fee awards for illegal seizures of private property would be minimized.

At any rate, "conflict" certiorari jurisdiction exists in the instant case as well, because the Eleventh Circuit's application of the "invited error" doctrine to unintentional or mistaken representations of fact is contrary not only to the decisions of other circuit courts of appeal, but also to the majority of state court decisions and federal district

court decisions addressing the point.

The doctrine of invited error is implicated when a party induces or invites the district court into making an error. *United States v. Stone*, 139 F.3d 822, 838 (11th Cir. 1998). *see also, United States v. Cook*, 336 Fed. Appx. 875 (11th Cir. 2009); *United States v. Silvestri*, 209 F.3d 1311, 1327 (11th Cir. 2005). Where invited error exists, it precludes a court from invoking the plain error rule and reversing. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1294 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *see also, United States v. Ross*, 131 F.3d 970, 988 (11th Cir. 1997).

The invited-error doctrine should not apply to the "error" in the trial court cited by the Eleventh Circuit, evidenced by Petitioners' request that attorney's fees be based upon the value of the CDs when purchased, which was $450,000.00. The doctrine of invited error is inapplicable because the "error" in requesting that the calculation of Petitioners' attorney's fees be based upon value of the CDs at the time of purchase was not voluntary or intentional, but was instead inadvertent; it

was made without knowledge of any alternative values of the CDs upon which attorney fees could be calculated, and entirely as a result of the failure of the United States to reveal the correct value, *i.e.*, the value of the CDs at the time of their seizure. *See, e.g., Statler v. Garcia*, No. C-01-00590-CRB, 2002 WL 31052588 (N.D. Cal. Sept. 11, 2002) ["In California, the settled doctrine of invited error regarding jury instructions is that 'the record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice.' *People v. Cooper*, 53 Cal.3d 771, 831, 281 Cal. Rptr. 90, 809 P.2d 865 (1991)."]; *People v. Graham*, 71 Cal.2d 303, 319, 78 Cal. Rptr. 217, 455 P.2d 153 (1969) (there is no "invited error" if defense counsel suggests or accedes to erroneous instruction because of neglect or mistake; invited error exists only if counsel expresses

deliberate tactical purpose in suggesting, resisting, or acceding to an instruction).

Several federal circuit courts of appeal have applied the doctrine of invited error to preclude an argument on appeal, but in so doing, have implicitly recognized that the purported errors at trial in those cases were ***not*** ones in which the complaining party had made an inadvertent or involuntary error. *See, Fitch v. Public Utility Comm. of Tex.*, 261 Fed. Appx. 788 (5th Cir. 2008) (failure of Texas Public Utility Commission during arbitration proceeding to order telecommunications carrier to compensate one-way paging carrier for termination of calls originated by telecommunications carrier was invited error, and thus, paging carrier could not raise issue in judicial review, where telecommunications carrier inadvertently omitted its pricing index for reciprocal compensation during the arbitration, and when it attempted to correct its omission and provide its reciprocal compensation rate, one-way paging carrier objected); *In re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996) (airline was not precluded, on appeal of judgments in favor of airplane manufacturer

on claims arising from fatal crash, from objecting to admission of evidence about disclaimers on tickets by certain passengers which precluded recovery in excess of specified liability limit unless actions of airline or crew were wanton or wanton and willful, on basis that airline itself had offered that evidence; district court had originally structured trial so that ticketing evidence would be presented in damages section of trial, following liability phase, but then restructured trial so that airline had to present ticketing evidence at liability phase or lose partial defense as to passengers with those tickets, so that airline's proffer of that evidence was not voluntary); *Continental Life & Acc. Co. v. Doig*, 443 F.2d 27, 28 (9th Cir. 1971) (declining to consider argument because order was presented by appellant and entered upon its request, and there was "no contention that the provision of that order giving rise to appellant's sixth point was included by inadvertence"). *See also*, *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225 (10th Cir. 2003) (invited-error doctrine prevented supplier of salmonella-contaminated chile rellenos from arguing on appeal from bench trial on

damages that damages caused when restaurant customers became ill should have been based on restaurant's diminution in value rather than on parent company's diminution in value, where, at trial, supplier specifically urged the district court to award damages based on parent company's diminution in value); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001) (Iran was estopped, pursuant to doctrine of invited error, from arguing on appeal in damages suit that equity valuation of minority shareholder's expropriated interest in Iranian corporation should have been determined according to exchange rate prevailing at time of expropriation or "open market" exchange rate, where Iran's own expert witness used alternate official exchange rate in his equity valuation). *Accord*, *Growers Marketing Service, Inc. v. Conner*, 249 So.2d 486, 487 (Fla. 2d DCA 1971) (inadvertent omission of arithmetic factor necessary in computation of damages, which occurred when complaint multiplied per pound damage figure times 10,000 boxes that dealer had failed to deliver, without making additional multiplication by average of

4.628 pounds per box, was not invited error). Such cases clearly establish that the invited error doctrine should not apply in cases where the alleged invitation was not made intentionally and knowingly by the party who is claimed to have made it. Insofar as the decision below conflicts with such existing precedent, this Court should grant certiorari to resolve such conflict, as well as for the other reasons previously mentioned.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

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Appendix A

United States Court of Appeals

For the Eleventh Circuit

No. 09-10402

District Court Docket No.

03-20526-CV-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

$125,938.62

Proceeds of certificates of deposit

number 1271734730,

$60,851.73

number 1271736329, et al.

Defendants,

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jan 28, 2010
JOHN LEY
ACTING CLERK

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit
By: /s
Deputy Clerk
Atlanta, Georgia

ARNOLDO JOSE ALEMÁN CARDENAL,

ANA EUGENIA FLORES,

JOSE GRULLON,

NORMA L. FLORES,

MARIA ALEJANDRA ALEMÁN CARDENAL,

CARLOS MIGUEL ALEMÁN CARDENAL,

MARIA DOLORES ALEMÁN CARDENAL,

Claimants Appellants.

Appeal from the United States District Court

for the Southern District of Florida

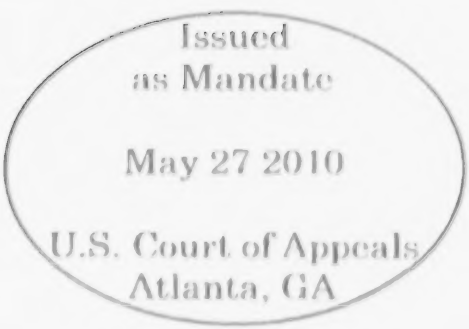
JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 28, 2010

For the Court: John Ley, Acting Clerk

By: Patch, Jeffrey



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10402

Non-Argument Calendar

D. C. Docket No. 03-20526-CV-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jan 28, 2010
JOHN LEY
ACTING CLERK

$125,938.62

proceeds of certificates of deposit

number 1271734730,

$60,851.73

number 1271736329, et al.

Defendants,

ARNOLDO JOSE ALEMÁN CARDENAL,

ANA EUGENIA FLORES,

JOSE GRULLON,

NORMA L. FLORES,

MARIA ALEJANDRA ALEMÁN CARDENAL,

CARLOS MIGUEL ALEMÁN CARDENAL,

MAMA DOLORES ALEMÁN CARDENAL,

Claimants-Appellants.

Appeal from the United States District Court

for the Southern District of Florida

(January 28, 2010)

Before EDMONDSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Maria Alejandra Alemán Cardenal, Arnoldo Jose Alemán Cardenal, Ana Eugenia Flores, Norma L. Flores, Jose Grullon, Maria Dolores Alemán Cardenal, and Carlos Miguel Alemán Cardenal (the claimants) appeal the district court's award of attorney's fees and costs in their favor pursuant to the Civil Asset Forfeiture Reform Act (CAFRA), 28 U.S.C. § 2465. In the underlying civil forfeiture action, the claimants successfully recovered the proceeds from five of seven certificates of deposit

(CDs) seized by the Government. The claimants bring two issues on appeal, which we address in turn.

I.

First, the claimants contend the district court erred in deducting a proportional amount of the total award requested to reflect the Government's partial judgment of forfeiture. Specifically, the claimants maintain the reversal of Arnoldo Alemán's Nicaraguan convictions for money laundering and embezzlement renders the partial forfeiture invalid. The claimants first raised the argument regarding Arnoldo Alemán's exoneration in two Federal Rule of Civil Procedure 60(b) motions for relief, both of which were filed after the claimants filed the present notice of appeal from their order awarding attorney's fees.

Pursuant to Federal Rule of Appellate Procedure 3, we lack jurisdiction to review any judgment or order that comes after, and is otherwise not designated, in a notice of appeal. *McDougald v. Jensen*, 786 F.2d 1465, 1474 (11th Cir. 1986). The notice of appeal underlying the instant matter exclusively designates the district court's

December 18, 2008, order awarding attorney's fees and predates the filing and disposition of the claimants' initial and renewed Rule 60(b) motions. Given the content and timing of the notice of appeal, we lack jurisdiction to review the district court's denial of the claimants' Rule 60(b) motions to amend the final order of forfeiture and the award of attorney's fees.

Additionally, as a general principle, arguments not properly raised before the district court are deemed waived and will not be considered on appeal. *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009). As the argument regarding Alemán's acquittal was not within the district court's purview when it issued the relevant order for attorney's fees, the argument is not properly before this Court with regard to the present appeal.

II.

The claimants further contend the district court erroneously relied on the amount of the five recovered CDs at the time of their purchase, rather than the time of seizure. They assert the district court erred in (1)

deducting a proportional amount of the total award requested, and (2) basing the award on the $450,000 value of the recovered CDs at the time of their purchase, rather than the $564,572 value at the time of their seizure.

"We review the district court's decision to award costs and attorney's fees for abuse of discretion." *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1326 (11th Cir. 2004). Under CAFRA, a claimant who substantially prevails in a civil forfeiture proceeding is entitled to "reasonable attorney fees and other litigation costs reasonably incurred," as well as post judgment interest. 28 § U.S.C. 2465(b)(1). Nonetheless, where a "court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly." *Id.* § 2465(b)(2)(D). Under the doctrine of invited error, however, we are precluded from reviewing an error on appeal where a party induces or invites that error. *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009).

Based on the information available to the district court at the time it issued the award for attorney's fees,

the court was statutorily obligated to reduce the award of costs and attorney's fees to reflect the two CDs successfully forfeited by the Government. In this regard, the district court did not abuse its discretion by dividing the total amount of attorney's fees requested by the total number of CDs involved in the case, and then deducting twice the average value of each CD to account for the Government's partial judgment.

Further, although the district court should have relied on the value of the five recovered CDs at the time of their seizure, the claimants invited this error by expressly notifying the court they had recovered $450,000. Under the doctrine of invited error, the claimants are therefore precluded from arguing on appeal the district court should have relied on the $564,572 value of the CDs in calculating the amount of attorney's fees based on the 40% contingency fee arrangement.

Consequently, the claimants have failed to demonstrate the district court abused its discretion in calculating an initial value of $180,000 in attorney's fees, which equals 40% of $450,000, and then deducting

a proportional amount to reflect the Government's forfeiture of two of the seven CDs. Accordingly, we affirm the district court.

AFFIRMED.

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Clerk U.S. Court of Appeals
Eleventh Circuit
By: /s
Deputy Clerk
Atlanta, Georgia

Appendix B

United States Court of Appeals

For the Eleventh Circuit

No. 07-10380

District Court Docket No.

03-20526-CV-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

$125,938.62

Proceeds of certificates of deposit

number 1271734730,

$60,851.73

number 1271736329, et al.

Defendants,

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THOMAS K. KAHN
CLERK

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Eleventh Circuit
By: /s
Deputy Clerk
Atlanta, Georgia

ARNOLDO JOSE ALEMÁN CARDENAL,

ANA EUGENIA FLORES,

JOSE GRULLON,

NORMA L. FLORES,

MARIA ALEJANDRA ALEMÁN CARDENAL,

CARLOS MIGUEL ALEMÁN CARDENAL,

MARIA DOLORES ALEMÁN CARDENAL,

Claimant-Appellants.

Appeal from the United States District Court

for the Southern District of Florida

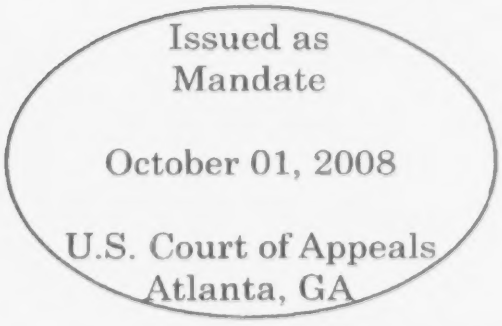
JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 6, 2008

For the Court: Thomas K. Kahn, Clerk

By: Gilman, Nancy



[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10380

D. C. Docket No. 03-20526-CV-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Aug 6, 2008
THOMAS K. KAHN
CLERK

$125,938.62

Proceeds of certificates

of deposit number 1271734730,

$60,851.73

number 1271736329, et al.,

Defendants,

ARNOLDO JOSE ALEMÁN CARDENAL,

ANA EUGENIA FLORES,

JOSE GRULLON,

NORMA L. FLORES,

MARIA ALEJANDRA ALEMÁN CARDENAL,

CARLOS MIGUEL ALEMÁN CARDENAL,

MARIA DOLORES ALEMÁN CARDENAL,

Claimants-Appellants.

Appeal from the United States District Court

for the Southern District of Florida

(August 6, 2008)

Before TJOFLAT and BLACK, Circuit Judges, and RESTANI,* Judge. BLACK, Circuit Judge:

In this civil forfeiture action brought under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983, the district court found seven certificates of deposit held in the names of Claimant-Appellants Maria Alejandra Alemán, Norma Flores, Jose Grullon, and Ana Flores were subject to forfeiture under 18 U.S.C. § 981(a)(1)(B) because they were derived from funds stolen from the Nicaraguan treasury during the presidency of Arnoldo Alemán.

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

On appeal, Appellants contend the Government failed to meet its burden of linking the certificates of deposit to embezzled funds. Although the Government now concedes that key evidence on which it relied at trial was inadmissible, it asserts the properly admitted evidence was sufficient to show, by a preponderance of the evidence, that the funds are subject to forfeiture. Having reviewed the entire record, we affirm the judgment of the district court with respect to certificates number 1275218528 and 1263604528 because the evidence properly presented to the court with respect to those funds was minimally sufficient to meet the Government's burden of proof. However, because the Government failed as a matter of law to meet its burden of proving by a preponderance of the evidence that certificates number 1271734730, 1256700028, 1279734728, 1271734729, and 1271737129 were derived from funds embezzled from the Nicaraguan treasury, we reverse the district court's order of forfeiture with respect to those certificates.

I. BACKGROUND

A. The Certificates of Deposit

During the late 1990s, while Arnoldo Alemán was President of Nicaragua, millions of dollars disappeared from the Nicaraguan national treasury. Around the same time, Byron Jerez, a friend of the Alemán family and a high-ranking official working in the Nicaraguan Treasury Department, withdrew funds from two entities, Consultores Corporativos (a company with which he was affiliated) and the Nicaraguan Democratic Foundation (of which he was a founding member). Jerez used the money to purchase certificates of deposit from Terrabank in Coral Gables, Florida, in the name of Alemán and several of his relatives. Alemán and his wife also opened several certificates of deposit at Terrabank during this period. Some of these certificates of deposit were later assigned to other members of the Alemán family.

In March 2003, the United States Government filed a civil forfeiture action in the United States District Court for the Southern District of Florida, contending that eight of the Terrabank certificates of deposit were

subject to forfeiture because they were derived from funds stolen from the Nicaraguan treasury.[1] The chart below summarizes the relevant details of each certificate at issue in this case:

Certificate Number: 1271734730
Amount: $100,000
Opened: 4/17/98
Original Owner: Arnoldo or Maria Alejandra Alemán
Current Owner: Maria Alejandra Alemán
Purchased By: Byron Jerez
Funds From: Nicaraguan Democratic Foundation

Certificate Number: 1256700028
Amount: $75,000
Opened: 3/6/98
Original Owner: Arnoldo or Amelia Alemán
Current Owner: Norma Flores
Purchased By: Arnoldo and Amelia Alemán
Funds From: Milerstone Business

Certificate Number: 1279734728
Amount: $100,000
Opened:4/17/98
Original Owner: Arnoldo Alemán or Carlos Alemán
Current Owner: Jose Grullon

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[1] The Government later abandoned its claim with respect to one of the certificates, leaving only seven at issue in this action.

Purchased By: Byron Jerez
Funds From: Nicaraguan Democratic Foundation

Certificate Number: 1271734729
Amount: $100,000
Opened: 4/17/98
Original Owner: Arnoldo Alemán or Arnoldo Jose Alemán
Current Owner: Ana Flores
Purchased By: Byron Jerez
Funds From: Nicaraguan Democratic Foundation

Certificate Number: 1271737129
Amount: $75,000
Opened: 5/26/98
Original Owner: Arnoldo Alemán or Carlos Alemán
Current Owner: Jose Grullon
Purchased By: Arnoldo Alemán
Funds From: Milerstone Business

Certificate Number: 1275218528
Amount: $75,999
Opened: 4/22/99
Original Owner: Arnoldo Alemán or Carlos Alemán
Current Owner: Jose Grullon
Purchased By: Byron Jerez
Funds From: Consultores Corporativos

Certificate Number: 1263604528
Amount: $75,000
Opened: 4/22/99

Original Owner: Arnoldo Alemán
Current Owner: Ana Flores
Purchased By: Byron Jerez
Funds From: Consultores Corporativos

(Dist. Ct. Findings of Fact & Conclusions of Law, at 2-3.)

After a few procedural false starts (including an appeal to and remand from this Court), the case proceeded to a bench trial.

B. The Government's Case

At trial, the Government attempted to present several summary witnesses, including Francisco Saavedra, a member of the U.S. Customs Asset Forfeiture Group, and Ivan Lara, the Nicaraguan lawyer who had prosecuted Alemán and Jerez on charges of embezzlement, money laundering, and other fraud. (Alemán was convicted of the charges against him; Jerez was acquitted.)

Unfortunately, many of the Government's key witnesses, including Saavedra and Lara had minimal non-hearsay testimony to offer; therefore, the Government's case turned primarily on the adequacy

of the documentary evidence admitted at trial. Among that evidence was an audit conducted by the Nicaraguan Government and prepared by witness José Calderón. According to Calderón's testimony and portions of the audit, which were translated into English and admitted into evidence, millions of dollars were illegally removed from the Nicaraguan treasury between 1997 and 2002, and were diverted to unauthorized, "extra-budgetary" funds controlled by the Ministry of the Presidency. Calderón testified that the audit did not trace any pilfered funds to the Terrabank accounts.

In addition to the audit evidence, the Government introduced through Lara numerous authenticated checks and other financial documents which Lara had obtained from Nicaraguan banks. The checks and their accompanying notations were not translated into English, and the district court did not permit the prosecutor to provide testimony regarding the meaning or relevance of the financial documents on the ground that such testimony would be hearsay coming from someone other than the records custodian. The Government argued

the documents revealed money had been routed from presidential funds to a changing house and from the changing house to Consultores Corporativos, a business with which Jerez was affiliated. The Government produced no financial documents linking embezzled money to either Milerstone Business or the Nicaraguan Democratic Foundation.

Of central importance to the Government's case was Exhibit 67, a copy of the final judgment of criminal conviction in Jerez and Alemán's Nicaraguan prosecution. Over the Claimants' strong objection, and after extensive discussion regarding the admissibility of the evidence, the district judge admitted two small portions of the judgment under the public records exception to the hearsay rule. Specifically, the court admitted the fact of Alemán's conviction for "laundering of money and/or assets proceeding from illegal activities, fraud, embezzlement of public monies, peculation, and association and instigation to commit crimes and electoral crime." (*See generally* Trial Trans. at 54:3-21, 80:19-81:9; *see also* Certified Translation of Final

Decision of the Nicaraguan First Criminal Court of the District, penultimate page.) The court also admitted a portion of the judgment acquitting Jerez, but suggesting he was guilty in fact of aiding and abetting the crimes of which Alemán had been convicted and that Jerez had done so in furtherance of Alemán's financial interests.

To bolster its claim that the money in the certificates of deposit could not have come from Alemán's personal holdings, the Government admitted financial disclosure statements filed by Alemán in 1997 and 2000, which list modest real property holdings and income.

C. The Claimants' Case

After the Government rested, the district court heard testimony from each of the claimants and from a friend of the Alemán family, who argued the money in the certificates of deposit had come from legitimate family business endeavors and from legitimate expenditures from the Nicaraguan Democratic Foundation. Maria Alejandra Alemán testified that her family had been in the coffee and cattle business for more than a century;

she could not, however, provide any details regarding the family business. The other claimants and the remaining witnesses provided similarly vague testimony regarding the origin of the funds used to open the certificates of deposit.

D. The District Court Order

On December 21, 2006, the district court issued an opinion holding the Government had met its burden of proving funds from the Nicaraguan Democratic Foundation, Milerstone Business, and Consultores Corporativos (the monetary sources for the certificates of deposit) were "traced to illicit activities by President Alemán and Byron Jerez." (*See* Dist. Ct. Findings of Fact & Conclusions of Law, dkt. #165, at 3.) Specifically, the district court found:

> [With respect to the five certificates of deposit purchased by Jerez], there was clear commingling of illicit funds with stolen money in the accounts of "Consultores Corporativos" and the Nicaraguan Democratic Foundation. The United States established that the certificates of deposit were purchased shortly after President Alemán's assumption of the Presidency

> of Nicaragua and millions of dollars were removed from Presidency accounts by his subordinates, specifically Byron Jerez, the actual purchaser of the certificates. The evidence showed that funds moved from the office of the Nicaraguan Presidency to a money exchange house, Multicombrios [sic], and then to Jerez's corporations, including Consultores Corporativos. Until then, Alemán's financial transactions in the United States had been modest. The Government also proved that the majority of the certificates of deposit were not purchased by the Alemán family and that Alemán's financial disclosure did not reflect the existence of a large amount of cash.
>
> In addition, the Government introduced the conviction and twenty year sentence of President Alemán for money laundering and embezzlement. Byron Jerez was "acquitted," but the Nicaraguan Court found that he did participate in the crime of fraud and used his "resourcefulness" to execute the illicit complex financial transactions. His "acquittal" was based upon a [sic] "principles of Proportionality and Opportunity." This evidence is clearly sufficient for the Government to meet its burden.

(*Id.* at 4-5.) Additionally, the district court found the testimony of the claimants not credible, and determined none had succeeded in proving he or she was an innocent

owner of the funds in question. (*Id.* at 7.) Consequently, the court ordered all seven certificates forfeited to the Government. (*Id.* at 8.)

II. DISCUSSION

On appeal, Appellants raise several challenges to the district court's forfeiture decision. Two require discussion: Appellants' contention that (1) the district court erred by admitting facts contained in the Nicaraguan judgment of conviction; and (2) the Government failed to adduce sufficient evidence to meet its burden of connecting the certificates of deposit to embezzled money.

A. Admissibility of Foreign Judgment of Conviction

We begin with the question whether the district court erred by admitting the Nicaraguan judgment of conviction and facts found in it and by relying on those facts to find Byron Jerez embezzled funds for the purpose of advancing Alemán's financial interests. We review evidentiary rulings for an abuse of discretion; "[h]owever, basing an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion *per se*." *United*

States v. Henderson, 409 F.3d 1293, 1297 (11th Cir. 2005).

The district court admitted the foreign judgment and facts found in it under the hearsay exception permitting courts to consider "factual findings resulting from an investigation made pursuant to authority granted by law . . . ." Fed. R. Civ. P. 803(8)(C). Before oral argument, we invited the parties to address the applicability of this Court's decision in *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994), which holds that Rule 803(8)(C), by its plain language, does not apply to judicial findings of fact. *Id.* at 1554.

In response, the Government concedes that the factual findings in the Nicaraguan judgment were improperly admitted. The fact of Alemán's conviction and the sentence he received remain admissible pursuant to Fed. R. Evid. 803(22); however, none of the relevant facts found in the judgment of conviction were admissible in the district court. Consequently, when evaluating Appellants' challenge to the sufficiency of the evidence, we may not consider facts drawn from the Nicaraguan judgment of conviction.

B. Sufficiency of the Evidence

Property located in the United States is subject to civil forfeiture when it is "derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation," 18 U.S.C. § 1956(c)(7)(B), so long as the offense against the foreign nation (1) involved "embezzlement of public funds by or for the benefit of a public official," *id.* § 1956(c)(7)(B)(iv); (2) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for more than one year; and (3) would be punishable under the laws of the United States by imprisonment for more than one year if the act or activity constituting the offense had occurred within the jurisdiction of the United States. 18 U.S.C. § 981(a)(1)(B)(i)-(iii).

At trial, the Government contended Alemán, assisted by his friend and former internal revenue secretary Byron Jerez, embezzled money from the Nicaraguan treasury, and after laundering it, purchased the seven certificates of deposit which are the subject of this forfeiture action. Embezzlement is an offense that is

punishable by more than one year's imprisonment in both Nicaragua and the United States, *see* Ex. 67 (Alemán's judgment of conviction for 20 years' imprisonment) and 18 U.S.C. § 641 (embezzlement of more than $1,000 in federal funds or property punishable by up to ten years' imprisonment); therefore, if the money used to fund the certificates of deposit was embezzled, the certificates are forfeitable to the United States Government.

Before the Civil Asset Forfeiture Reform Act took effect, in order to prevail at a forfeiture hearing, the Government was required to establish only probable cause to believe the property in question was connected to a crime. *United States v. Bowman*, 341 F.3d 1228, 1233-34 (11th Cir. 2003). The burden then shifted to the claimant to establish by a preponderance of the evidence that the property was not connected. *Id.* CAFRA was "designed to rectify an unfairness to the individual vis-a-vis the government" by "forcing the Government to prove that property is subject to forfeiture as opposed to forcing the property owner to prove his property is not subject to forfeiture." *United States v. Bowman*, 341 F.3d

1228, 1236 (11th Cir. 2003) (citing *United States v. Real Property in Section 9, Town 29 North*, 241 F.3d 796, 799 (6th Cir. 2001)). Under CAFRA the Government bears a heavier burden: it must now prove by a preponderance of the evidence that property is subject to civil forfeiture. 18 U.S.C. § 983(c)(1).[2]

In an appeal from an *in rem* civil forfeiture, we review the district judge's factual findings for clear error, and his conclusions of law *de novo*. See *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001). At oral argument, we asked the Government to submit to us what

[2] When the government claims that property is subject to forfeiture because it "was used to commit or facilitate the commission of a criminal offense," the Government must "establish that there was a substantial connection between the property and the offense." 18 U.S.C. § 983(c)(3). Claimants contend § 983(c)(3) is relevant to this case; however, the Government does not contend the certificates of deposit were "used to commit or facilitate" embezzlement: it argues the certificates were purchased with the fruits of the embezzlement. Consequently, the Government was required to demonstrate only that the funds were derived from or were traceable to, any proceeds obtained directly or indirectly from the embezzlement of public funds from the Nicaraguan treasury.

should have been provided to the district court: a chart showing the evidentiary connection between money stolen from the Nicaraguan treasury and the money used to fund the certificates of deposit at issue in this case. Appellee's submission clarifies the relevance of the financial documents submitted at trial relating to payments made from the presidential treasury, through Multicambios, to foreign businesses and ultimately to Consultores Corporativos. From Consultores Corporativos, Jerez drew the funds used to purchase certificates of deposit numbers 1275218528 and 1263604528. The district court did not clearly err by finding this evidence was sufficient to meet the Government's burden of proof with respect to those certificates.[3]

[3] Certificates number 1275218528 was owned by Jose Grullon, while certificate number 1263604528 was owned by Ana Flores. At trial, both claimants raised an innocent owner defense under 18 U.S.C. § 983(d)(1). Innocent ownership is an affirmative defense defined narrowly by the statute. Under the statutory definition, an innocent owner must be either an owner whose interest in the property exists at the time the conduct giving rise to the forfeiture takes place, *id.* § 983(d)(2)(A), or one who acquired a property interest after the

The same cannot be said with respect to the evidentiary support for forfeiture of the remaining certificates of deposit. As the Government's charts themselves reveal, there is no direct evidence connecting certificates of deposit numbers 12717347330, 12567000028, 12797347728, 12717347729, and 12717377129 to money embezzled from the Nicaraguan treasury.

The Government contends their case with respect to these certificates was circumstantial, and points to the following evidence: the audit which showed money was stolen from the Nicaraguan treasury during Alemán's presidency; Alemán's financial statements, which showed he had modest personal holdings at the

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conduct giving rise to the forfeiture has taken place, *id.* § 983(d)(3)(A). With respect to this second class, the statute defines an innocent owner as one who, at the time that person acquired the interest in the property,

> (i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value), *and*
>
> (2) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

time the certificates of deposit were purchased; evidence that other certificates purchased by Jerez were derived from embezzled funds and that some of Jerez's personal assets were forfeited to the United States in an unrelated forfeiture action; documents from Terrabank showing Jerez purchased three of the five certificates at issue; and the fact Jerez had a connection to the Nicaraguan Democratic Foundation.

Circumstantial evidence is one thing; speculation another. The Government's case with respect to funds derived from the Nicaraguan Democratic Foundation amounted to little more than an invitation for the district court to conclude that because Jerez used embezzled funds to purchase certificates of deposit 1275218528 and 1263604528, he must have done the same when he

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Id. § 983(d)(3)(A) (emphasis added). Neither Grullon nor Flores testified that he or she was a "bona fide purchaser or seller for value" of the certificates of deposit. Under the plain language of the statute, then, they would not have been entitled to raise an innocent ownership defense even if the district court had credited their testimony.

purchased certificates 1271734730, 1279734728, and 1271734729, with funds from the Nicaraguan Democratic Foundation, an organization which, according to the uncontroverted testimony presented at trial, had no restrictions on the use of its funds. The evidence was insufficient as a matter of law to meet the Government's burden with respect to these three certificates.

With respect to certificates 1256700028 and 1271737129—purchased by Arnoldo and Amelia Alemán in the amount of $75,000 each—the Government places considerable emphasis on Appellants' failure to produce business records proving the certificates were funded with proceeds from the Alemán family's coffee or livestock business, rather than with embezzled funds. Appellants, however, were under no obligation to come forward with evidence of their rightful ownership. Rather, it was the Government's burden to show the money used to purchase the certificates of deposit was derived from embezzled funds—and that it did not do. Consequently, we hold the evidence was insufficient as a matter of law to support the district court's forfeiture

order with respect to these two certificates, as well.

III. CONCLUSION

Given the evidence adduced at trial, the district court did not clearly err in finding the Government met its burden of proving certificates of deposit 1275218528 and 1263604528 were subject to forfeiture because they were derived from funds stolen from the Nicaraguan treasury. We affirm the court's order of forfeiture with respect to those two certificates. With respect to certificate numbers 1271734730, 1256700028, 1279734728, 1271734729, and 1271737129 , however, the Government failed to meet its burden to present evidence of a connection between those funds and funds stolen from the Nicaraguan treasury. Therefore, we reverse the denial of the district court with respect to those five certificates.

AFFIRMED IN PART and REVERSED IN PART.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit
By: /s
Deputy Clerk
Atlanta, Georgia

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10402-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 19, 2010
JOHN LEY
CLERK

$125,938.62

Proceeds of certificates of deposit

number 1271734730,

$60,851.73

number 1271736329, et al.

Defendants,

ARNOLDO JOSE ALEMAN CARDENAL,

ANA EUGENIA FLORES,

JOSE GRULLON,

NORMA L. FLORES,

MARIA ALEJANDRA ALEMAN CARDENAL,

CARLOS MIGUEL ALEMAN CARDENAL,

MARIA DOLORES ALEMAN CARDENAL,

Claimants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: EDMONDSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s

UNITED STATES CIRCUIT JUDGE ORD-42